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NO. 87-1989

in the Supreme Court of the United States

October Term, 1987

In Re: Theodore B. Gould, Holywell Corporation
Miami Center Limited Partnership
Chopin Associates, and Miami Center Corporation

Petitioners,

vs.

Fred Stanton Smith, as Trustee of
Miami Center Liquidating Trust

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, CHIEF BANKRUPTCY JUDGE THOMAS C. BRITTON, SENIOR BANKRUPTCY JUDGE SIDNEY M. WEAVER

HERBERT STETTIN, P.A.
ONE S.E. THIRD AVENUE #2215
MIAMI, FLORIDA, 33131
TELEPHONE 305-374-3353

Attorney for Respondent
Fred Stanton Smith, as Trustee
Miami Center Liquidating Trust

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QUESTIONS PRESENTED

1. Whether the district court and the Court of Appeals for the Eleventh Circuit erred in not reversing the bankruptcy court's findings of fact and conclusions of law because the bankruptcy court adopted the findings and conclusions proposed by the Bank of New York?

2. Whether the Bankruptcy Code allows the creation of a trust and appointment of a trustee to carry out the terms of a plan of reorganization?

3. Whether the bankruptcy court can retain jurisdiction over a confirmed plan, plan assets, creditors and debtors to enforce the terms of the plan?

4. Whether the Bank of New York is an undersecured creditor?

5. Whether the order on substantive consolidation was proper and based upon applicable bankruptcy law?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the petitioners (Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership, Chopin and Theodore Gould), the Bank of New York, the United States Bankruptcy Court for the Southern District of Florida, Chief Bankruptcy Judge Thomas C. Britton, Senior Bankruptcy Judge Sidney M. Weaver, and Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust.

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STATEMENT OF THE CASE

The petitioners are five affiliated chapter 11 debtors. All were involved in the development of what is known as the Miami Center project, consisting of an office building, a hotel, a shopping arcade, and a parking garage. The Bank of New York ("bank") financed construction of the project and was the major creditor. When the construction loans went into default and the bank began foreclosure proceedings, the petitioners filed simultaneous voluntary petitions in the United States Bankruptcy Court for the Southern District of Florida on August 22, 1984. The next day the bankruptcy court granted the debtors' motion for joint administration of the estates.

Following the filing of the voluntary petitions, the debtors moved the bankruptcy court to allow closings to occur on prepetition contracts to sell real estate owned by Twin Development Corporation, a wholly-owned non-filed subsidiary of petitioner, Holywell Corporation. That property is known as the Washington properties. The bankruptcy court granted the debtors' motion, and the closings occurred in December, 1984 and January, 1985. The bankruptcy court's order of December 11, 1984, required the debtors to place the net proceeds due petitioners Gould and Holywell from the sales in a segregated account subject to further order of the court (234 a).

Thereafter, upon motion of the Bank of New York, the bankruptcy court entered a cash collateral order (223a), finding that the bank had a first lien on the interest of Gould and Holywell in the net proceeds from the sale of the Washington properties. The Court held that the net proceeds from the sale of the Washington properties constituted cash collateral as defined in 11 U.S.C. Section 363 (225a).

The debtors and the bank filed competing plans of reorganization. The creditor committees recommended, and the individual creditors overwhelmingly approved, the bank's amended plan and rejected the plans submitted by the debtors. The bank's plan provided for the substantive consolidation of the debtors' estates and for creation of the Miami Center Liquidating Trust and the appointment of a liquidating trustee to disburse Trust property to creditors in accordance with the terms of the plan.

The debtor's plans, all nearly identical, included all of the cash collateral proceeds from the sale of the Washington properties (100a).

The Trust was funded, *inter alia*, by all of the debtors' 11 U.S.C. Section 541 (a) defined assets, including proceeds from the sale of the Miami Center property to the bank or its nominee, and the proceeds of sale of the Washington properties. On August 8, 1985, the bankruptcy court confirmed the bank's plan (246a).

The debtors moved the bankruptcy court for a stay of the confirmation order pending appeal. After a hearing at which the bankruptcy court took evidence as to the amount owed creditors and the value of the debtors' assets, the court granted a stay conditioned upon the posting of a $140 million bond (46a). On emergency motion of the debtors, the district court lowered the amount of the bond to $50 million on the assumption the appeal could be expedited and determined in 90 days, and required the bond be filed by October 10, 1985. An appeal of this ruling to the Eleventh Circuit was unsuccessful. No further relief from this Order was sought. The debtors did not seek an injunction against implementation of the plan. As there was no bond posted, the plan became effective October 10, 1985, and the liquidating trustee conveyed the Miami Center property to the bank's designee for $255.6 million, as provided in the

confirmed plan. The Miami Center property conveyed included fixtures, furnishings and equipment. The bank not only acknowledged it had no further claim against the debtors (excepting only certain claims for fees and costs incurred in enforcing the claim) it also paid the net cash difference between its lien and the purchase price to the liquidating trustee. The trustee then began paying the over 400 creditors from reserves established for that purpose (46a).

On appeal to the district court, the debtors attacked the consolidation and the confirmation orders, and the bank and the liquidating trustee moved to dismiss the appeal as moot. The district court held the bankruptcy court had failed to enter sufficient findings of fact and conclusions of law to support an adequate review, and it remanded the case for further proceedings for that purpose (47a). The district court denied motions to dismiss the appeal as moot.

On remand, after hearing, the debtors and the bank each submitted proposed findings and conclusions. The bankruptcy court adopted those proposed by the bank. The bankruptcy court held that, *inter alia*, no stay was in effect, the plan had been consummated, and "it is legally and practically impossible to unwind the consummation of the bank's plan or otherwise restore the status quo before confirmation" (96a). The debtors appealed again.

Without considering the issue of mootness, the district court addressed the merits and the bankruptcy court's "elaborate" findings (52a), and affirmed in all respects (11a). The debtors appealed to the Court of the Appeals for the Eleventh Circuit, which ultimately dismissed the appeal as moot because the plan had been substantially consummated and the court could not grant meaningful relief to the debtors if they prevailed (42a). The debtors thereafter filed a Petition for Writ of Certiorari to this Court (case No 87-1988) and the instant Petition for Writ of Mandamus.

The debtors had previously filed a petition for writ of mandamus in the Eleventh Circuit to correct certain perceived abuses. It has been denied (1a).

In late 1987, Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust ("liquidating trustee"), initiated an adversary proceeding in the bankruptcy court in which he sought, *inter alia*, declaratory relief on the issue of whether the bank was an undersecured creditor. The issue arose because the August 8, 1985 confirmation order contained a statement that the bank was undersecured (246a). That statement contained no reference to any finding of fact. The debtors appealed that confirmation order and the district court remanded for further findings sufficient to allow for appellate review (65a). On remand, the bankruptcy court entered extensive findings of fact and conclusions of law (96a). The order of confirmation on remand did not contain a conclusion of law that the bank was undersecured. To the contrary, it contained findings of fact that indicate the bank was oversecured (96a). The district court reviewed the merits of the confirmation order on remand and affirmed. The Eleventh Circuit then dismissed the debtors' appeal as moot.

The bankruptcy court's order on the issue of the bank's undersecurity was in favor of the bank. It was based, *inter alia*, upon earlier findings of the court that (1) the Miami Center property was worth $255.6 million (96a), (2) the bank had a first lien on cash collateral in excess of $30 million (223a) and (3) the bank's mortgage lien on the Miami Center property was approximately $234 million, plus interest of $75,000 per day after March 14, 1985 (96a). The bankruptcy court, therefore, held the bank was not undersecured. The debtors appealed that ruling to the district court, case no: 88-0151 CIV ARONOVITZ; the appeal has been fully briefed as of March, 1988, and remains pending.

SUMMARY OF ARGUMENT

The bankruptcy court's confirmation of the plan was entirely proper. Confirmation of the plan proposed by the bank followed a full evidentiary hearing at which all of the petitioner's objections were heard. The debtors appealed that order and the district court remanded for further findings. The bankruptcy court invited evidence, but the parties introduced none except for evidence on valuation and calculation of the amount of the bank's lien. The parties then submitted proposed findings and conclusions, and the bankruptcy court adopted those submitted by the bank. The district court applied the clearly erroneous standard to the lower court's findings and affirmed. On appeal to the Eleventh Circuit, the court reviewed the bankruptcy court's findings, and ruled that the district court should have dismissed the case as moot because of substantial consummation. There was no impropriety in the procedures followed.

The trust and the liquidating trustee are entities contemplated by the Bankruptcy Code and may properly carry out the terms of the confirmed Plan. In light of the dismissal of the appeal from the order of confirmation, the plan and the trust are proper and not subject to further attack.

The bankruptcy court has continuing jurisdiction to enforce the terms of the confirmed plan pursuant to the terms of the plan itself, and under applicable bankruptcy law. The bankruptcy court's jurisdiction extends to the trust assets and includes disputes as to what is a trust asset.

The bankruptcy court's order of substantive consolidation was based upon applicable case law and was within the court's general equitable powers under 11 U.S.C. Section 105. The petitioners' claim that absent consent or a piercing of

the corporate veil there can be no consolidation is without basis.

The bankruptcy court had jurisdiction to determine whether the Bank of New York was an undersecured creditor, and thereby entitled to post-petition interest, because the bankruptcy court's conclusions are based on adequate factual findings.

The Petition for Writ of Mandamus should be denied in its entirety, for the bankruptcy court and the bankruptcy judges have acted properly and within the scope of their jurisdiction.

ARGUMENT

The petitioners contend that the Court of Appeals for the Eleventh Circuit erred: (1) in dismissing their appeal on the ground of mootness; (2) in concluding substantial consummation precluded effective relief; (3) in sanctioning the bankruptcy court's "usurpation of power" (petition for writ of mandamus, p.15); (4) in condoning conduct violative of due process; and (5) by acting to nullify the rules of procedure for non-jury trials with the intention of precluding effective appellate review. For the reasons stated below, these claims are wholly without basis.

CONFIRMATION OF THE PLAN WAS PROPER AND IN ACCORDANCE WITH THE LAW

The petitioners complain that the bankruptcy court's adoption *in toto* of the Bank of New York's proposed findings of fact and conclusions of law was tantamount to a denial of due process. The petitioners have failed to correctly state either the facts of the case or the law governing the issue.

On July 23, 1985, the bankruptcy court approved the substantive consolidation of the debtor's estates and overruled their objections to that portion of the plan. The bankruptcy court reserved consideration of the other provisions of the plan until a hearing on whether to confirm the petitioners' plan or the competing plan proposed by the Bank of New York. Confirmation of the plan proposed by the Bank of New York followed a full evidentiary hearing at which the petitioners' objections were heard.

On appeal, the district court held the orders of consolidation and confirmation were "intertwined and independent," but that the bankruptcy court had not entered sufficient findings of fact and conclusions of law to allow for appellate review. The district court remanded the cause to the bankruptcy court with directions to conduct further hearings and to make such findings of fact and conclusions of law as were necessary to provide the district court with a basis on which to decide the merits of the appeal (65a).

As summarized in the opinion of the Eleventh Circuit:

> On remand, on the consolidated issue, the bankruptcy court conducted a hearing, took evidence, and heard argument. On the confirmation issues it invited evidence. None was tendered except on valuation and calculation of the amount of the bank's lien (42a).

The bankruptcy court then entered a confirmation order on remand in which it adopted, *in toto*, the Bank of New York's proposed findings of fact and conclusions of law. As noted by the Eleventh Circuit, the bankruptcy court asked for and received proposed findings from both the petitioners and the bank. The bankruptcy court adopted those of the bank. In a footnote, the Eleventh Circuit stated:

> Debtors question this procedure (as has this court, *Cabriolet Porsche-Audi, Inc. v. American Honda Motor Co.*, 773 F.2d 1193, 1198 n.2 (11th Cir. 1985), **but this does not render the findings and conclusions invalid.** *Anderson v. Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504, 84 L.Ed. 2d 518 (1985). The district court examined the findings under the plainly erroneous rule and affirmed them. We review them as relevant to the mootness issue. Examining them in that restricted scope, we find no error (emphasis added).

Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547, 1551, n.4 (11th Cir. 1988) (42a).

Despite this clear statement, the petitioners claim the district court and the Eleventh Circuit "sanctioned the bankruptcy court's abandonment of its duty under FRCP 52, as adopted in Bankruptcy Rule 7052." (Petition for Writ of Mandamus, p. 19).

The petitioners misstate the holding of this Court's decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), when they claim "[t]he resulting misapplication of *Anderson v. City of Bessemer City, supra*, has nullified the rules promulgated for trial without jury." (Petition for Writ of Mandamus, p.19). This Court was clear in *Anderson*: although the Court disapproved of the practice of adopting findings prepared by a party, the findings are those of the court and are reversible only if clearly erroneous. 470 U.S. at 572. As the Court stated:

> We too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements

> unsupported by citation to the record. *See,* e.g., *United States v. El Paso Natural Gas Co.* 376 U.S. 651, 656-657, 12 L.Ed. 2d 12, 84 S. Ct. 1044 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615, n 13, 41 L Ed 2d 978, 94 S. Ct. 2856 (1974). We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor. *See J. Wright*, The Non Jury Trial—Preparing Findings of Fact, Conclusions of Law, and Opinions, Seminars for Newly Appointed United States District Judges 159, 166 (1962). Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *United States v. Marine Ban-corporation, supra*, at 615, n. 13, 41 L.Ed. 2d 978, 94 S. Ct. 2856; *United States v. El Paso Natural Gas Co., supra*, at 656-657, 12 L.Ed. 2d 12, 84 S. Ct. 1044.

Ibid.

The petitioners argue the existence of a rule that the adoption by a court of a party's proposed findings is a *per se* denial of due process, citing the Fourth Circuit Court of Appeal's 1961 decision in *Chicopee Manufacturing Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir. 1961). This Court held in 1985 in *Anderson*, that such findings **are** in fact the findings of the trial court. So long as those findings of fact and conclusions of law survive the "clearly erroneous" standards of review, as they did in both the district court and the Court of Appeals for the Eleventh Circuit, there is no basis for the petitioners' claim of a violation of due process.

MANDAMUS IS NOT THE PROPER REMEDY TO OBTAIN DISSOLUTION OF THE LIQUIDATING TRUST AND THE DISMISSAL OF THE TRUSTEE

The petitioners cite no applicable cases to support the theory that the Trust should be dissolved and the trustee should be dismissed. The Bankruptcy Code does not prohibit the creation of a trust to carry out a confirmed plan of reorganization. The Bankruptcy Code does not, as the petitioners imply, contain a mandate that a reorganization plan can only be carried out by the debtor. In fact, Section 1142 clearly contemplates that a trust may be created to carry out the terms of a plan of reorganization. It states: "Notwithstanding any otherwise applicable non-bankruptcy law, rule, or regulation relating to financial condition, the debtor and *any entity organized or to be organized for the purpose of carrying out the plan* shall carry out the plan and shall comply with any orders of the court. 11 U.S.C. Section 1142(a) (emphasis added).

The confirmed plan in this case created the Miami Center Liquidating Trust as the entity for collecting and holding assets necessary to pay the petitioners' debts, as properly filed and finally determined. The petitioners complain that the creation of the trustee under the terms of the plan violates 11 U.S.C. Section 1104(a), but that section of the Code is entirely inapplicable, as are the cases cited in the Petition for Writ of Mandamus.

Section 1104(a) sets out the requirements and procedures for the appointment of a *bankruptcy* trustee. As the petitioners correctly point out, the liquidating trustee of the Miami Center Liquidating Trust is not a bankruptcy trustee; he is a contract trustee. By definition, Section 1104(a) does not apply to his appointment. There are no cases and there is no statutory authority to prevent the creation of a contract trustee to carry out the terms of a plan of reorganization.

In the Matter of Gaslight Club, Inc., 782 F.2d 767 (7th Cir. 1986), cited by the petitioners in support of their position is factually inapposite. It involved the bankruptcy court's replacement of the debtor-in-possession corporation's president and majority shareholder on motion made by the creditors' committee. The issue in that case was merely one of corporate control prior to confirmation of a plan. The Seventh Circuit held that the bankruptcy court's appointment of a replacement to the debtor-in-possession's president, as opposed to a bankruptcy trustee, was permissible under the Bankruptcy Code.

The petitioners also rely upon *In re Martin*, 26 B.R. 39 (Bkrtcy. S.D. W. Va. 1982), to support the assertion that the order appointing the trustee should be reversed, yet that case involved neither a contract trustee nor a confirmed plan providing for the creation of a trust and the appointment of a trustee. In *Martin*, the issue was whether the bankruptcy court had authority under the Code to appoint a successor to a deceased debtor-in-possession. The bankruptcy court held that "[n]either the facts of this case nor the law justifies creation of a new entity known as 'successor' to the debtor-in-possession.' 26 B.R. at 39-40. The court held that, prior to confirmation, the options available upon the death of a debtor-in-possession include appointment of a trustee, appointment of an examiner, conversion, or dismissal of the case. 26 B.R. at 40. This case obviously has no applicability to the plan in question, which dealt with a post-confirmation contract trustee appointed for the purpose of identifying and paying creditors. The liquidating trustee in this case is simply not a pre-confirmation "successor" to a deceased debtor-in-possession.

Likewise, the petitioners' reliance upon *In re Memorial Estates, Inc.*, 797 F.2d 516 (7th Cir. 1976) is also wrong, for the issue in that case was whether the law permitted the appointment of a receiver in a bankruptcy case. There, the

debtor's principal asset was a cemetery on which the Chicago Bank of Commerce held a mortgage. After the debtor defaulted, the bank began foreclosure proceedings in state court and sought appointment of a receiver. Prior to the appointment of a receiver, the debtor filed a voluntary petition and the foreclosure action was removed to the bankruptcy court. Thereafter, the bankruptcy court recommended to the district court that a receiver should be appointed in the foreclosure proceeding,[1] and the district court agreed. A bankruptcy trustee was also appointed to liquidate the debtor's assets. The court of appeals held that the appointment of a receiver under these facts did not violate 11 U.S.C. Section 105(b) (which states that receivers shall not be appointed in bankruptcy proceedings) because the receiver was appointed as an adjunct to a separate controversy between the debtor and a mortgage lien creditor. 797 F.2d at 520-21.

The petitioners liken the post-confirmation contract trustee in this case to a receiver because his powers are similar to those of a receiver under the Bankruptcy Act. That is sophistry. Simply because Fred Stanton Smith, who is a contract trustee of the Miami Center Liquidating Trust, has powers similar to those of a receiver under the Bankruptcy Act does not create an illegality. His responsibilities as trustee are not prohibited by the Bankruptcy Code in any respect. The Code does not bar the creation of a trust established to control the debtors' property and it does not bar the appointment of a trustee empowered to identify and pay creditors with that property. In fact, the Bankruptcy Code allows for a trust. 11 U.S.C. Section 1142(a). Trusts have been

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[1]The bankruptcy court could not directly appoint a receiver beause the foreclosure suit was a "related" rather than a core proceeding. *In re Memorial Estates, Inc.*, 797 F.2d at 518.

used to carry out plans of reorganization. *See* e.g., *In re Sonner*, 53 B.R. 859 (Bktcy. E.D. Va. 1985).

THE BANKRUPTCY COURT HAS CONTINUING JURISDICTION TO ENFORCE THE TERMS OF THE CONFIRMED PLAN OF REORGANIZATION

The bankruptcy court has post-confirmation jurisdiction under the terms of the confirmed plan in this case, as provided by the Bankruptcy Code.

Section 1142(a) of the Bankruptcy Code states: "[n]otwithstanding any otherwise applicable nonbankruptcy law, rule or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court." Section 1142(b) further states "[t]he court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and *to perform any other act*, including the satisfaction of any lien, *that is necessary for the consummation of the plan*." 11 U.S.C. Section 1142(b) (emphasis added). Rule 3020(d) of the Rules of Bankruptcy Procedure provides "[n]otwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate." *See Harlow v. Palouse Producers, Inc. (In re Harlow Properties, Inc.)*, 13 C.B.C. 2d 1438 (9th Cir., B.A.P., 1985) (bankruptcy court may direct a debtor or other party to perform any act necessary to consummate an approved plan, including the transfer of property under the control of a non-debtor party); *In re Lombard-Wall, Inc. v. NYC Hous. Dev. Corp. (In re Lombard-Wall, Inc.)*, 12 C.B.C. 2d 492 (Bktcy. S.D. N.Y. 1984) (a creditor's failure to object to a chapter 11 plan in which its claim is noted as disputed indicates its acceptance of the bankruptcy court's continued jurisdiction over any actions arising from its claim).

Consistent with Section 1142 of the Bankruptcy Code and Bankruptcy Rule 3020(d), Article XIV of the confirmed Amended Consolidated Plan of Reorganization provides, in pertinent part, that the bankruptcy court "shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan had been made and until entry of a final decree, "to make any orders which are necessary or appropriate to carry out the provisions of this Plan. . ." The petitioners have pointed to no order of the bankruptcy court as evidence of an exercise of jurisdiction beyond the scope of that which is necessary or appropriate to carry out the terms of the confirmed plan, which is binding on the petitioners, creditors, and all interested parties, regardless of whether they accepted the plan. 11 U.S.C. Section 1141(a);[2] *See also In re St. Louis Freight Lines, Inc.*, 45 B.R. 546 (Bktcy. E.D. Mich., N.D. 1984).

THE BANKRUPTCY COURT HAS JURISDICTION OVER ANY DISPUTE INVOLVING ASSETS OF THE PLAN, INCLUDING STOCK OF A DEBTOR

The bankruptcy court has continuing jurisdiction to enforce the terms of the plan, including any disputes over assets of the plan. Article V of the confirmed plan states, in pertinent part:

> A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party in

[2] 11 U.S.C. Section 1141(a) provides: "**Effect of confirmation.** (a) Except as provided in subsections (d) (2) and (d) (3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan."

> interest) is designated as Trustee of *all property of the estates of the Debtors within the meaning of Section 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors* described in Exhibit C and those pending in the litigation against Bank of New York ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. (emphasis added).

Section 541(a) of the Bankruptcy Code includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. Section 541(a)(1). The scope of the definition of "property" in Section 541(a) is extraordinarily broad and includes all types of property and rights to property which the debtor possesses. *In re Golden Plan of California, Inc.*, 37 B.R. 167 (Bkrtcy. Ca. 1984); *In re Koch*, 14 B.R. 64 (Bktcy. Kan. 1981). This property right encompasses all the stock owned by a debtor, including the stock of wholly-owned subsidiary companies of a corporate debtor. *In re Deak and Co., Inc.*, 63 B.R. 422 (Bkrtcy. S.D. N.Y. 1986) (shares of stock owned or controlled by the debtor were property of the estate thereby providing the bankruptcy court with *in rem* jurisdiction in an adversary proceeding to declare stock pledge a voidable preference); *In re Peoples Bankshares, Ltd.*, 68 B.R. 536 (Bktcy. N.D. Iowa 1986); *In re Wallace*, 66 B.R. 834 (Bktcy. E.D. Mo. 1986). Thus, all of the stock owned by the petitioners became the property of the Miami Center Liquidating Trust pursuant to the express terms of the confirmed plan.

THE BANKRUPTCY COURT'S ORDER SUBSTANTIVELY CONSOLIDATING THE PETITIONERS' ASSETS WAS PROPER AND SHOULD BE AFFIRMED

The Bankruptcy Court's order on remand of January 29, 1986 confirming the plan found as follows: the five debtors are Holywell Corporation, of which debtor Theodore B. Gould is president and sole stockholder; Miami Center Limited Partnership, a Florida Limited partnership of which Gould and Miami Center Corporation are sole general partners; Miami Center Corporation, a Florida corporation of which Holywell Corporation is the sole stockholder; Chopin Associates, a Florida general partnership of which Gould and Miami Center Corporation are the sole general partners; and Gould himself. Over 400 creditors had an interest in those proceedings, including many of the contractors and sub-contractors involved in the construction of the Miami Center, and many former employees. A central feature of the Plan was consolidation of the five estates, on condition that Holywell's unaffiliated creditors were paid first, the unaffiliated creditors of the other petitioners paid next, and the many inter-debtor and related party claims were paid thereafter. The voting indicated overwhelming support for the bank's plan (96a).

On the issue of substantive consolidation of the bankruptcy estates, the bankruptcy court found that all the creditors' committees supported substantive consolidation, and that no creditor, save those controlled by Gould, objected to consolidation of the debtors' estates at the hearing on motion for substantive consolidation. Petitioner Gould testified that petitioner Holywell Corporation was the ultimate beneficiary of all profits made by Gould-controlled entities, that the interrelated debtor companies customarily moved money among themselves and that the corporate debtors operated at a profit. In addition, the bankruptcy court

found that the debtors sought and received approval from that court of the existence of undisputed liabilities of the debtors for payments to terminated employees of a number of Holywell's wholly-owned subsidiaries, including Holywell Telecommunications Company. The Court found that all such employees performed services for the Miami Center project owned by debtors Miami Center Limited Partnership and Chopin Associates (96a).

The Bankruptcy Court made additional extensive findings and conclusions to support its order of substantive consolidation. Rather than re-print those findings, the respondent directs the court to the bankruptcy court's Order on Remand, found in the petitioners' appendix, 96a, paragraphs thirty one (31) through forty-one (41). The bankruptcy court applied these findings in accordance with the principles announced in *In re Donut Queen, Ltd.*, 41 B.R. 706 (Bkrtcy. E.D. N.T. 1984), and then engaged in a detailed analysis of those factors and the findings to support its conclusion that the debtors' estates should be consolidated. *See* bankruptcy court's Order on Remand, petitioners' appendix, 96a, paragraphs fifty-eight (58) through sixty-six (66).

Based upon all of the factors enunicated in *Donut Queen*, and the court's general equitable powers under 11 U.S.C. Section 105(a), the bankruptcy court concluded that substantive consolidation was appropriate because of, *inter alia*, the "substantial unity of ownership interests in all five debtors in Gould." The court found that substantive consolidation was in the best interest of the creditors and would not prejudice the debtors. The court further stated:

> As provided by the Bank's plan, each debtor will retain its individual name, form of organization, and the right to continue business, after discharge.

> The debtors will not disappear in a mergerlike consolidation as is sometimes sought in such cases. The Bank's plan does require that each debtor's assets be exposed to the claims of creditors of all of the related estates, however, so the Bank has labeled that aspect of its plan as 'substantive consolidation.' The Court finds that the Bank has accepted and satisfied its burden under applicable precedent. The Court does not believe that the hundreds of creditors involved here should be required to engage in a shell game or to have to guess which debtor is most likely to be able to pay. Many of the creditors are not represented by counsel and apparently are not even aware that they have claims against several of the estates under Florida law, rather than just the single estate of the primary obligor. **The need for creditors to file such claims and to trace assets is completely attributable to the labyrinth that Gould has created. Consolidation here will not make any debtor pay any creditor unless that debtor or one of its secondarily-liable co-debtors (principally Gould) was legally responsible for the claim involved.** (128a) (emphasis added).

The petitioners' statements that, absent Holywell Corporation's consent, and absent a piercing of the corporate veil, there was no basis for substantively consolidating the bankruptcy estates, simply ignores the very detailed and conclusive findings of fact and conclusions of law made by the bankruptcy court.

As stated in *Donut Queen*, *supra*, an order of substantive consolidation "hinges on a balancing of the equities favoring consolidation against the equities favoring continued debtor separateness." 41 B.R. at 709 (citations omitted). In this case, the Bankruptcy Court found few "equities favoring continued

debtor separateness", and that the factors favoring consolidation were clearly mandated. The petitioners have not provided any reasonable basis to reverse this conclusion.

MANDAMUS IS NOT THE PROPER REMEDY REGARDING THE PETITIONERS' COMPLAINT THAT THE BANK IS UNDERSECURED

Mandamus is not the proper method by which the debtors can address the issue of whether the bank was undersecured.

In the August 8, 1985, confirmation order, the bankruptcy court stated that the "Bank of New York, the major creditor whose claim is undersecured . . ." (246a). That order contained no finding of fact to support that empty statement. The debtors appealed that order and the district court remanded with instructions to the bankruptcy court to enter such findings of fact and conclusions of law as would be sufficient to allow appellate review (65a). On remand, the bankruptcy court entered extensive findings and conclusions to support confirmation of the plan (96a). Yet the Order on Remand is entirely silent on the issue of the bank's undersecurity. The district court affirmed the confirmation order (11a) and the Eleventh Circuit dismissed the debtors' appeal as moot (42a). As a result, the liquidating trustee filed an adversary complaint in the bankruptcy court seeking, *inter alia*, declaratory relief as to the debtors' claim that the bank was an undersecured creditor and therefore not entitled to a credit at closing for post-petition interest when the bank purchased the Miami Center property. The bankruptcy court heard argument reviewed the pleadings, its prior findings establishing the value of the bank's collateral and the amount of the bank's lien, the plan and applicable law. It then held that the bank was not an undersecured creditor (202a). The debtors appealed that order to the district court, case no. 88-0151-CIV-Aronovitz, where it has been briefed and remains pending.

The debtors now seek *mandamus* in this Court, after having taken an appeal (necessitating the filing of briefs), and without waiting for a decision. The only abuse herein has been the petitioners' abuse of the judicial system.

The bankruptcy court found that the bank's mortgage lien was $234,342,742.93, plus interest in excess of $75,000 per day after March 14, 1985, and that the bank's collateral included over $30 million in cash collateral, and real estate and improvements worth $255.6 million (96a). These findings from the confirmation order were affirmed by the district court and the Eleventh Circuit dismissed the debtors' appeal as moot. That is the law of this case. That is the only conclusion the bankruptcy court could reach in the order about which the petitioners complain. The debtors choose to cling to one naked statement contained in the initial confirmation order and ignore the actual findings that entirely support the bank's position as an *oversecured* creditor.

The issuance of a Writ of Mandamus on this issue is improper in light of the fact that (1) the facts support the bankruptcy court's order, and (2) the debtors have already availed themselves of the judicial process by appealing the bankruptcy court's order to the district court, where the case has been briefed since March, 1988 and remains pending.

CONCLUSION

The debtors' Petition for Writ of Mandamus should be denied. The petitioners have failed to demonstrate that the bankruptcy court has entered any order or engaged in any conduct outside the scope of its jurisdiction. Moreover, the errors complained of are unsupported, as more fully explained in the simultaneously filed brief in opposition to the Petition for Writ of Certiorari.

Respectfully Submitted,

HERBERT STETTIN, ESQUIRE
Herbert Stettin, P.A.
1 S.E. 3rd Avenue
Suite 2215
Miami, Florida 33131
Attorney for Fred Stanton Smith,
trustee of the Miami Center
Liquidating Trust